United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1206

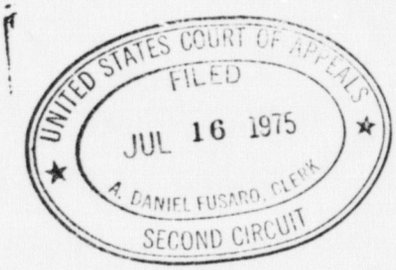
To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- WILLIE WILLIAMS, Appellant.	Docket No. 75-1206

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTIONS PRESENTED

1. Whether the introduction of testimony concerning appellant's assertion during post-arrest interrogation of his Fifth and Sixth Amendment rights denied appellant the protection afforded by the Fifth Amendment and requires reversal.

2. Whether the refusal of the District Court to hold a hearing outside the presence of the jury on the voluntariness of appellant's statements and the subsequent failure to instruct the jury on that issue constitutes reversible error.

3. Whether the District Court's comment on the inculpatory statement made by appellant was improper and requires reversal.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable John M. Cannella) rendered on May 28, 1975, after a trial by jury, convicting appellant Willie Williams of attempting to take money from the person of another by means of intimidation (18 U.S.C. §2113(a)). Appellant was sentenced to a term of imprisonment of five years, and is currently serving that sentence.

The District Court granted leave to appeal in forma pauperis, and this Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

The indictment* here charges that appellant attempted to take money in violation of 18 U.S.C. §2113(a) from Edna Rosa, a bank teller at the Manufacturers Hanover Trust Company branch ("the bank") located at 350 Park Avenue in New York City.

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*The indictment is "B" to appellant's separate appendix.

Prior to trial a hearing was held pursuant to Simmons v. United States, 390 U.S. 377 (1968), on appellant's motion to suppress the courtroom identification of him by employees of the bank, Edna Rosa, Glenn Mahon, and Gary Stewart.* Although the Government conceded, and the District Court found (H.173**), that the photographic procedures used here were unnecessarily suggestive (H.7),*** the District Court nevertheless held, based on the totality of the circumstances, that the suggestive identification procedure did not give rise to a substantial likelihood of irreparable misidentification (H.173-174), and therefore denied the motion to suppress.

At trial Edna Rosa, one of the bank tellers on duty on February 18, 1975, testified that, while she was taking care of customers (T.40), an individual whom she identified as

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*Mahon and Stewart were mail clerks employed by the bank and were nearby when the attempted robbery occurred.

**Numerals in parentheses preceded by "H" refer to pages of the transcript of the pre-trial hearing. Numerals in parentheses preceded by "T" refer to pages of the transcript of the trial.

***On March 17, 1975, approximately one month after the attempted robbery, the FBI showed Rosa, Mahon, and Stewart a series of surveillance photographs of the robbery and mug shots of appellant (H.6, 89), some with appellant's name on them (H.125). Earlier in March Stewart had been shown this series of surveillance photographs by his supervisor (H.142) and Stewart, in turn, had shown the photographs to Mahon (H.105). Further, when the FBI agent showed Rosa the mug shot of appellant, he told Rosa that the photograph was of the man who had attempted the robbery (H.53).

appellant and who had been waiting in line approached her holding a one dollar bill in one hand and a piece of paper in the other and said, "Change this" (T.40). Rosa replied, "What?", whereupon the individual pushed the piece of paper forward and said, "This" (T.40). The note* contained two lines: The top line stated, "You are covered;" the second line read, "Pase -- the mony" (T.43). Rosa testified that she read only the second line of the note (T.52, T.54, H.43, H.59) and filled a money bag with five, ten, and one dollar bills (T.45-46). Then she ducked under the counter with the money bag and pressed the alarm button (T.46).

Appellant then allegedly walked out the Park Avenue exit of the bank (T.136) and turned west on 52nd Street.

Meanwhile, Mahon was standing in line behind this individual, waiting to cash a personal check (T.134), and saw him leave (T.136). Stewart, another employee, was standing nearby against a pillar (T.135). At Mahon's direction, Stewart chased after appellant and proceeded to the corner of Park Avenue and 52nd Street where he saw appellant (T.108) walking west on 52nd Street smoking a cigarette (T.119-120). Stewart grabbed appellant and asked him if he had just come out of the bank on the corner (T.109). Stewart testified that appellant said, "What bank? I don't know anything about a bank" (T.109, 120). Stewart took appellant back to the bank (T.151).

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*A Xerox copy of the relevant side of the note is "D" to appellant's separate appendix.

FBI Agent Michael J. McHale testified at trial that he and another agent were summoned to the bank (T.177) where they arrested appellant (T.180).

In the jury's presence, and over defense objection (T. 179),* McHale further testified that he read the waiver of rights form to appellant (T.180-181) and that appellant refused to sign it (T.181). McHale further stated that during questioning at the bank appellant consented to give certain background data (T.181), but then asserted that "he did not wish to discuss anything without having a lawyer present" (T.182). McHale testified that appellant was then taken to the New York City office of the FBI (T.182), where another attempt was made to question him. McHale stated that appellant was advised of the Miranda rights again (T.182) and that again appellant refused to sign the waiver of rights form (T.182). McHale further stated that he again asked appellant whether he desired to answer questions about the bank robbery (T.182), and appellant again "stated that he

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* Q. Would you please tell us to the best of your recollection what you said and what [appellant] said, if anything.

[Defense counsel]: Objection, your Honor. I ask for a sidebar.

The Court: Lay a foundation. There is no need for a sidebar.

(T.179).

did not wish to answer any questions without a lawyer present" (T.182).

According to McHale, the interrogation then ended and appellant was taken to be fingerprinted (T.182).*

Over defense objection,* the Assistant United States Attorney was permitted to elicit from McHale that while

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*After cross-examination of McHale by defense counsel, the District Court instructed the jury that the fact that an individual does not answer any questions after he is given warnings of his constitutional rights may not raise any inference in the minds of the jurors. Specifically, the Court stated:

> I want to instruct the jury that the Miranda warning is a warning that was named after a case that was decided by the Supreme Court. A defendant or any person being interrogated has a right to be fully warned before he is questioned and that fact that he does not answer any questions after he is given the warning may not raise any inference in your mind of any kind whatsoever. He has a right to refuse to answer. On the other hand, just as any human being has a right, he has a right to change his mind or do something else about it. This is a judgment you will have to make when you consider this part of the evidence. But the mere fact that he took advantage of the rights that he has is not to prejudice him in any way whatsoever at either time.
>
> (T.191-192).

**Objection was interposed by defense counsel and a sidebar ensued. At the sidebar defense counsel specifically requested that any further testimony be taken outside the hearing of the jury (T.183). This request was denied (T.183). After the Government made an offer of proof about appellant's statement, the District Court found that there was no coercion involved and specifically allowed an exception to the Court's ruling (T.183).

appellant was being fingerprinted he stated, "I did not rob any bank.... I was only there to obtain change for a dollar bill" (T.184).*

During summation, the Government characterized appellant's statement that he didn't rob the bank but went there only to change a dollar bill as "among the strongest evidence come [sic] from the defendant himself" and as "preposterous" (T.253). At the Government's request, the Court included in its instructions to the jury a charge** on false exculpatory statements and, in a further reference to appellant's statement, stated:

> ... By the way, if that is a fact, where is the change to the dollar. How did he wind up with the bill out on 52nd Street if he went in to change a dollar as he said he did. Because he still had the dollar when they picked him up.
>
> (T.279).

Defense counsel's objection to this comment was overruled (T. 291).

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*FBI Agent Michael Kirchenbauer was called as a witness by the defense. Inter alia, he testified about the suggestive identification procedures employed. On cross-examination by the Government, Kirchenbauer was allowed to testify about the statement made by appellant.

**The complete charge is "C" to appellant's separate appendix.

The District Judge failed to instruct the jury on the issue of the voluntariness of any statements made by appellant.*

After deliberating, the jury returned with a verdict of guilty as charged.

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*The District Court apparently intended to instruct the jury on the issue of the voluntariness of statements made by appellant. Judge Cannella stated that, in deciding the strongly contested issue of identification, the jurors should consider the totality of the evidence. "Including the pictures it includes, if you accept as voluntary the statement which I will explain to you in a minute, that he made to McHale..." (T.282. Emphasis added). No such instructions were given, however.

ARGUMENT

Point I

THE INTRODUCTION OF TESTIMONY CONCERNING APPELLANT'S ASSERTION DURING POST-ARREST INTERROGATION OF HIS FIFTH AND SIXTH AMENDMENT RIGHTS DENIED APPELLANT THE PROTECTION AFFORDED BY THE FIFTH AMENDMENT AND REQUIRES REVERSAL.

FBI Agent McHale testified that in the bank he read to appellant the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966), and that appellant responded that he did not wish to discuss anything without having an attorney present. Agent McHale further testified that appellant was again warned of his rights at FBI Headquarters and that he again stated he did not wish to answer any questions without a lawyer present. Thus, Agent McHale was permitted to inform the jury that appellant had repeatedly invoked his rights under the Fifth and Sixth* Amendments by refusing to answer questions until he had spoken to a lawyer. This was error and requires reversal. United States v. Hale, 43 U.S. L.W. 4806 (June 23, 1975); Miranda v. United States, supra,

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*The testimony offered improperly penalized appellant's assertion of his Sixth Amendment right to counsel because it allowed the jury to draw improper and prejudicial inferences from the fact that appellant desired not to speak before consulting a lawyer. United States v. Nielsen, 392 F.2d 849, 853 (7th Cir. 1968); United States v. Priest, 409 F.2d 491, 493 (5th Cir. 1969). The likely and improper conclusion drawn by the jurors from this fact and the assertion by appellant of his right to counsel was that appellant was guilty.

384 U.S. at 468, n.37; cf. United States v. Nielsen, 392 F.2d 849, 852, 853 (7th Cir. 1968); United States v. Priest, 409 F.2d 491, 493 (5th Cir. 1969).

In United States v. Ghiz, 491 F.2d 599, 600 (4th Cir. 1974), a case similar to this one, an FBI agent testified at trial that the accused stated that he desired not to answer any questions concerning a stolen tractor which had been transported in interstate commerce. The Court stated:

> ... [I]f, in declining to answer certain questions, a criminal accused invokes his fifth amendment privilege or in any manner indicates he is relying on his understanding of the Miranda warning, evidence of his silence or of his refusal to answer specific questions is inadmissible.
>
> Id., 491 F.2d at 600.

See also United States v. Moore, 484 F.2d 1284, 1286 (4th Cir. 1973).

What the Fourth Circuit wrote regarding the defendant in Ghiz is applicable to the situation here:

> There can be little doubt that in stating that he did not desire to answer any questions concerning the Mack tractor, Ghiz was relying on his understanding of the Miranda warning which had been read to him at the beginning of the interview. He was on trial for the unlawful transportation of the Mack tractor and the jury may well have found significance in his refusal to talk about it.
>
> Id., 491 F.2d at 600.

Agent McHale's testimony about appellant's assertion of his Fifth and Sixth Amendment privileges was inadmissible,

and the conviction must be reversed.* See also United States v. Nielsen, supra, 382 F.2d at 851; Gillison v. United States, 399 F.2d 586, 587-588 (D.C. Cir. 1968); United States v. Mullings, 364 F.2d 173, 175 (2d Cir. 1966); cf. United States v. Semensohn, 421 F.2d 1206, 1209 (2d Cir. 1970).

Nor did the District Court's curative instruction (T.190-191) remedy this fatal defect. Instructions worded more strongly than these** were held to be ineffective to cure this kind of error in United States v. Hale, supra, 43 U.S.L.W. at 4807, n.3:

> The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest.
>
> Id., 43 U.S.L.W. at 4808.

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*The Assistant United States Attorney compounded the problem here by stating in summation that after being advised of his rights appellant "again said he had nothing to say. He wouldn't say anything about the robbery until his lawyer was present" (T.261). This comment was improper. Griffin v. California, 380 U.S. 609, 614 (1965); Wilson v. United States, 149 U.S. 60 (1893).

**The trial judge in Hale instructed the jury that the defendant "was not required to indicate where the money came from. You may disregard it, ladies and gentlemen." The court below vaguely instructed the jury that the defendant's refusal to answer questions "may not raise any inference in your mind of any kind," and never instructed the jury to disregard the testimony that appellant had invoked his Fifth and Sixth Amendment rights. See United States v. Andersen, 498 F.2d 1038, 1044 (D.C. Cir. 1974).

Moreover, there is a greater danger of prejudice here than in Hale since appellant exercised his right not to testify at trial. See, e.g., Wilson v. United States, 149 U.S. 60, 65-66 (1893); United States v. Agueci, 310 F.2d 817, 830-831 (2d Cir. 1962); 18 U.S.C. §3481. Here there was not even an opportunity consistent with this right to explain or justify his silence. Compare United States v. Feinberg, 383 F. 2d 60, 70 (2d Cir. 1967). Further, the testimony about appellant's assertion of Fifth and Sixth Amendment rights was more prejudicial than the erroneous cross-examination in Hale since it was part of the Government's direct case and could have been considered by the jurors on the issue of guilt rather than, as in Hale, simply on the issue of credibility of the accused who had already chosen to testify.

The preservation of appellant's Fifth and Sixth Amendment rights in this context is so important and the potential prejudice so great that, even absent specific objection,* the error mandates reversal. In United States v. Rose, 500 F.2d 12, 17 (2d Cir. 1974), this Court was faced with a claim that

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*In this case, although defense counsel did not make specific objection to testimony concerning appellant's assertion of his Fifth and Sixth Amendment rights, he did object to any testimony given about conversations between Agent McHale and appellant. For example, at page 179 of the trial transcript, McHale was asked by the Government the following question: "Would you please tell us to the best of your recollection what you said and what he said, if anything." Defense counsel objected and asked for a sidebar.

the Government improperly discredited the defendant Rose's testimony by eliciting on cross-examination that Rose remained silent during post-arrest interrogation. This Court did not reach the merits of the issue, however, because of counsel's failure to object, reasoning that had proper objection been made the error could have been cured. The Supreme Court recently vacated this Court's judgment in Rose (43 U.S.L.W. 3674, June 24, 1975) and remanded for reconsideration in light of Hale.*

Because the Government improperly introduced testimony about appellant's assertion of his Fifth and Sixth Amendment rights, the conviction here must be reversed.

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*In Hale, the Court found ineffectual a curative instruction much stronger than the one here, discussed supra at 11.

Point II

THE REFUSAL OF THE DISTRICT COURT TO HOLD A HEARING OUTSIDE THE PRESENCE OF THE JURY ON THE VOLUNTARINESS OF APPELLANT'S STATEMENTS AND THE SUBSEQUENT FAILURE TO INSTRUCT THE JURY ON THAT ISSUE CONSTITUTES REVERSIBLE ERROR.

The requirements of 18 U.S.C. §3501(a) are clear:

> Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confessions as the jury feels it deserves under the circumstances.

The statutorily prescribed procedure was not followed. Although objection was interposed as to statements made by appellant to FBI Agent McHale (T.179), and despite the fact that at the sidebar defense counsel specifically requested that testimony about the voluntariness of the defendant's statements be given outside the jury's presence (T.183), the District Judge passed on the issue of voluntariness without a hearing outside the jury's presence and permitted McHale to testify before the jury concerning appellant's admission that he had been in the bank that day. This procedure did not comport with the explicit requirements of 18 U.S.C. § 3501(a), Compare United States v. Barry, Doc. No. 75-1060, slip opinion 4117, 4119-4120 (2d Cir., June 18, 1975), and

deprived appellant of his constitutional right to challenge the voluntariness of his confession. Jackson v. Denno, 378 U.S. 368, 395 (1964); United States v. Feinberg, supra, 383 F.2d at 69-70; United States v. Nielsen, supra, 392 F.2d at 852; cf. United States v. Johnson, 409 F.2d 861, 863 (7th Cir. 1969); Simmons v. United States, 390 U.S. 377, 394 (1968); see also United States v. Jackson, 390 U.S. 570, 581, 583 (1968).

The procedure utilized here effectively prevented appellant from presenting any evidence about the voluntariness of the statements he allegedly made. While appellant was in a position to provide testimony contradicting Agent McHale's version of the facts, here this would have required that appellant testify before the jury and be subject to questions from the Assistant United States Attorney about his guilt or innocence of the offense. Thus, appellant was forced to sacrifice his statutory and constitutional right to challenge outside the presence of the jury the voluntariness of his confession (18 U.S.C. §3501; Jackson v. Denno, supra, 378 U.S. 368) in order to assert his Fifth Amendment right to remain silent at trial. Wilson v. United States, supra, 149 U.S. at 65-66; see also United States v. Nielsen, supra, 392 F.2d 849; United States v. Johnson, supra, 409 F.2d at 862-863; cf. United States v. Feinberg, supra, 383 F.2d at 69-70.

Although the District Court ruled on the voluntariness of appellant's statement and alluded to instructions to be

given on this issue (T.282), the Judge never charged the jury "to give such weight to the confession as the jury feels it deserves under all the circumstances," 18 U.S.C. §3501(a); United States v. Barry, supra, slip opinion at 4123, 4124, nor did he relate this general instruction to the specific facts involved here. This Court has recently ruled that this failure is plain error and grounds for reversal. United States v. Barry, supra, slip opinion at 4125, 4128.

Moreover, the failure to give this charge here was not harmless error. United States v. Barry, supra, slip opinion at 4127. Appellant's statement that he had been in the bank that day was the only evidence, independent of the challenged identification testimony, which linked appellant to the crime. The concededly suggestive identification testimony in this case was severely challenged at trial and was discussed by defense counsel (T.216-218, 220-224, 226-227, 230) and the Government (T.259-260) on summation, and by the Judge in his charge (T.277-278). The Assistant United States Attorney stated in summation, "Clearly such an admission by the defendant himself is among the strongest evidence [to] come from the defendant himself" (T.253). Under these circumstances this error, which is of constitutional dimension, cannot be said to be harmless. Chapman v. California, 386 U.S. 18 (1967).

Point III

THE DISTRICT COURT'S COMMENT ON THE INCULPATORY STATEMENT MADE BY APPELLANT WAS IMPROPER AND REQUIRES REVERSAL.

The standard for examining the propriety of comments made by a Federal trial judge while discussing evidence at trial is clear:

> So long as the trial judge does not by one means or another try to impose his own opinions as to the facts on the jury and does not act as an advocate in advancing factual findings of his own, he may in his discretion decide what evidence he will comment upon.
>
> United States v. Tourine, 428 F.2d 865, 869 (2d Cir. 1970).

See also United States v. DeLaMotte, 434 F.2d 289, 292 (2d Cir. 1970).

Here, in discussing appellant's statement about being in the bank, the Judge stated:

> ... By the way, if that is a fact, where is the change to the dollar. How did he wind up with the bill out on 52nd Street if he went in to change a dollar as he said he did. Because he still had the dollar when they picked him up.
>
> (T. 279).

Counsel objected to this statement (T.291). Although couched in the form of a series of questions, the Judge's comment dovetailed with the Government's earlier characterization of appellant's statement as "preposterous," and

clearly advocated the jury's rejection of the statement made by appellant as incredible and the jury's acceptance of the concommitant position that appellant's statement showed a consciousness of guilt (see T.279). This was error and requires reversal. United States v. Tourine, supra, 428 F.2d 865.

CONCLUSION

For the foregoing reasons, the judgment below must be reversed and the case remanded to the District Court for a new trial.

Respectfully submitted,

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Certificate of Service

July 16, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Nathan Silberman